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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. HAROLD EUGENE SMITH, Defendant and Appellant.	2d Crim. No. B205538 (Super. Ct. No. BA279883-01) (Los Angeles County)

Harold Eugene Smith appeals from the judgment entered following his conviction by a jury of three counts (1, 4, and 5)[1] of forcible rape committed against three victims on separate occasions. (Pen. Code, § 261, subd. (a)(2))[2] As to each count, the jury found true allegations that (1) appellant had committed the offense during the commission of a burglary (§ 667.61, subd. (e)(2)), and (2) appellant was convicted in the present case of committing rape by force against more than one victim. (*Id.*, subd. (e)(5).) In addition, as to each of counts 1 and 4, the jury found true an allegation that appellant had used a deadly weapon or firearm in the commission of the offense within the meaning of section 12022.3, subdivision (a). The trial court found true one prior serious felony conviction. (§ 667, subd. (a)(1).)

[1] The jury verdict forms refer to count 4 as count 2 and count 5 as count 3.
[2] All statutory references are to the Penal Code unless otherwise stated.

Appellant was sentenced to prison for three consecutive life terms for the rapes, plus five years for the prior serious felony conviction. As to each of the three life terms, the court ordered that appellant serve a minimum term of 15 years before being eligible for parole. As to each of counts 1 and 4, it imposed the four-year middle term for the section 12022.3 enhancement and then stayed execution of the sentence pursuant to section 654.

Appellant was identified as a suspect through a search of a database that contained his DNA profile. The DNA profile taken from the crime scene samples matched appellant's DNA profile. A match made by searching a DNA database is referred to as a "cold hit." Appellant contends that the trial court erroneously excluded evidence relating to the statistical significance of the cold hit match. We conclude that appellant failed to preserve this issue for appeal because he did not make an offer of proof of its statistical significance. We modify the judgment to correct sentencing errors and affirm the judgment as modified.

Factual and Procedural Background

The rapes occurred in 1995 and 1996. The rapist was African-American. A DNA profile was developed from spermatozoa recovered from the victims. In 2004, the State Department of Justice (Department) ran that DNA profile against a database containing the DNA profiles of approximately 263,000 felons.[3] The Department made a cold hit to appellant's DNA profile. Further tests of defendant's saliva confirmed the match. Appellant is African-American.

At trial, an expert testified that the frequency of the matched DNA profile is one in 57 quadrillion in the Caucasian population, one in 73 quadrillion in the Hispanic population, and one in 6.7 quadrillion in the African-American population. A quadrillion

[3] This figure is taken from appellant's motion to exclude DNA evidence. The motion alleged: "On June 24, 2004, the Department of Justice, submitted a sample from [*sic*] and ran it against the database containing the profile of 262,847 felons and identified [appellant] as matching the profile in the assaults against [two of the victims]. Subsequent testing later match [*sic*] [appellant] as matching the DNA profile from [the third victim]."

is the number 1 followed by 15 zeros, "a million times more than a billion." The expert further testified that, in view of these numbers, there was a "zero possibility" that the spermatozoa recovered from the victims had come from someone other than appellant.

Before the trial began, the prosecution filed a motion in limine "to exclude evidence of the DNA 'cold hit' used by law enforcement to originally identify [appellant] as a suspect." The motion also sought to preclude appellant "from cross-examining the People's witnesses or presenting his own witnesses to comment and/or address any issue regarding the 'cold hit,' including any accompanying statistics." In the motion's conclusion, the prosecution requested that appellant "be prohibited from introducing evidence of the DNA 'cold hit' and from offering any other statistical calculation other than the conservative number generated by the LAPD's Scientific Services Bureau listed in their report which is 'generally accepted within the scientific community.' "

The grounds for the prosecution's motion were twofold: (1) the cold hit evidence was irrelevant; and (2) even if the evidence were relevant, it should be excluded under Evidence Code section 352 because its admission "would lead to the introduction of complicated statistical information which would needlessly confuse and mislead the trier of fact." The trial court granted the motion in a minute order stating: "The court grants the People's motion . . . regarding presentation of DNA 'cold hit' and its accompanying statistics . . . ."

Discussion

I

Statistical Significance of a Cold Hit DNA Match

"Forensic DNA analysis is a comparison of a person's genetic structure with crime scene samples to determine whether the person's structure matches that of the crime scene sample such that the person could have donated the sample." (*People v. Nelson* (2008) 43 Cal.4th 1242, 1257-1258 (*Nelson*).) "Once a match is found, the next question is the statistical significance of the match. [Citation.] . . . 'Experts calculate the odds or percentages - usually stated one in some number - that a random person from the relevant population would have a similar match.' [Citation.]" (*Id.*, at pp. 1258-1259.)

A match may be made by comparing a known suspect's DNA profile to DNA found at the crime scene. Here, on the other hand, "the match did not come about by comparing a suspect's profile with the crime scene sample but by a cold hit from a database. Cases like this are sometimes called 'trawl cases' because the match was discovered by searching a database of previously obtained DNA samples. [Citation.]" (*Nelson, supra,* 43 Cal.4th at p. 1259.) "[I]n a cold hit case, four different methods for calculating the statistical significance of a match have been suggested." (*Id*., at p. 1261.) The method used by the prosecution in the instant case was "the random match probability calculated by use of the product rule." (*Ibid*.) This method "calculate[s] the rarity of the sample in the relevant population." (*Id*., at p. 1259.) It " 'estimates the chance that any *single,* random person drawn from the relevant population would have the same DNA profile as that of the unknown person whose DNA was found at the crime scene.' " (*Id*., at p. 1260.) In *Nelson* our Supreme Court held that, in a cold hit case, the product rule's method of statistical analysis is not subject to the *Kelly* test[4] and is admissible because it generates relevant evidence. (*Id*., at pp. 1259-1260, 1266.) *Nelson* was decided after appellant's trial.

A second method for calculating the statistical significance of a match in a cold hit case " 'was suggested by the National Research Council in 1992.' " (*Nelson, supra*, 43 Cal.4th at p. 1261.) This method's approach "would give a result that is reliable, although one that might be unnecessarily conservative." (*Ibid*.) In *Nelson* our Supreme court noted that, in *United States v. Jenkins* (D.C.Ct.App. 2005) 887 A.2d 1013, 1022, fn. 17 (*Jenkins*), the highest court in the District of Columbia did not address "this approach because it 'is no longer accepted or followed by the relevant scientific community.' " (*Nelson, supra,* 43 Cal.4th at pp. 1261-1262.)

A third method is the " 'Balding-Donnelly' approach." (*Nelson, supra*, 43 Cal.4th at p. 1263.) "[T]his method would result in evidence slightly more favorable to the

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[4] *People v. Kelly* (1976) 17 Cal.3d 24.

prosecution than would use of the product rule." (*Ibid*.) It has been "criticized . . . as inherently confusing, difficult to explain to a jury, and possibly misleading." (*Ibid*.)

The final method has been referred to as the " 'database match probability' " calculation "because it gives the probability of a match from the database. [Citation.]" (*Nelson, supra,* 43 Cal.4th at p. 1262.) In *Nelson* our Supreme Court observed that the *Jenkins* court had "noted that 'the "database match probability" [approach] . . . more accurately represents the chance of finding a cold hit match' and 'can overcome the "ascertainment bias" of database searches. "Ascertainment bias" is a term used to describe the bias that exists when one searches for something rare in a set database.' [Citation.]" (*Id*., at p. 1266, quoting from *Jenkins*, *supra*, 887 A.2d at pp. 1018-1019.)

To explain how the database match probability method can overcome the ascertainment bias of database searches, the *Nelson* court gave the following example: "Assume the product rule calculated a random match odds of one in 1,000,000. If a single suspect were compared and a match found, the result would be surprising unless the suspect were the actual donor of the evidence. But if a database of 100,000 were searched, the odds - or database match probability - would be about one in 10 that a match would be found even if the actual donor were not in the database. Thus, a match would be less surprising. If the database had a million profiles, at least one match would be expected even if the actual donor were not in the databank." (*Nelson*, *supra*, 43 Cal.4th at p. 1262.)

In *Nelson* the database contained about 184,000 profiles. Pursuant to the database match probability method, "[t]he odds for Hispanics, the group producing odds most favorable to defendant, would be about one in five followed by 18 zeros." (*Nelson*, *supra,* 43 Cal.4th at p. 1262, fn. 1.) Pursuant to the product rule method, the odds for Hispanics were one in 930 followed by 21 zeros. (*Id*., at p. 1249.)

In holding that the product rule calculation is admissible in cold hit cases, the *Nelson* court did not preclude admission of the database match probability calculation: "The conclusion that statistics derived from the product rule are admissible in a cold hit case does not mean that they are the *only* statistics that are relevant and admissible. The

database match probability statistic might *also* be admissible. . . . [I]t is unlikely the database match probability statistic would have been significant to the jury in this case given the size of even that number. But in a different case, if the database were large enough and the odds shorter than those here, the database match probability statistic might also be probative. Nothing we say prohibits its admission." (*Nelson, supra,* 43 Cal.4th at p. 1267, fn. 3.)

II

By Not Making an Offer of Proof, Appellant
Failed to Preserve His Claim of Error for Appeal

Appellant contends that the trial court erroneously excluded evidence relating to the statistical significance of the cold hit match: "The evidence excluded by the trial court in this case was indisputably relevant. Appellant was entitled to present alternative theories on the methods used to calculate the probability that only he could have been the perpetrator of the charged offenses." "[T]he trial court's exclusion of any evidence other than the product rule . . . deprived him of his rights pursuant to the Sixth and Fourteenth Amendments of the United States Constitution, as well as the California Constitution."

To preserve his claim of error for appeal, it was incumbent upon appellant to make an offer of proof in the trial court. Evidence Code section 354 provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, *an offer of proof,* or by any other means . . . ." (Italics added.) "An offer of proof should give the trial court an opportunity to change or clarify its ruling and in the event of appeal [should] provide the reviewing court with the means of determining error and assessing prejudice. [Citation.] To accomplish these purposes an offer of proof must be specific. It must set forth the actual evidence to be produced and not merely the

facts or issues to be addressed and argued. [Citations.]" (*People v. Schmies* (1996) 44 Cal.App.4th 38, 53.)

Appellant did not make an offer of proof of the statistical significance of the cold hit evidence excluded by the trial court. Thus, we cannot determine whether that evidence would have been admissible. The *Nelson* court did not say that, in a cold hit case, statistics derived from methodologies other than the product rule are admissible. The court observed that its conclusion allowing the admission of "statistics derived from the product rule . . . does not mean that they are the *only* statistics that are relevant and admissible. The database match probability statistic might *also* be admissible." (*Nelson, supra*, 43 Cal.4th at p. 1267, fn. 3.) The fair import of the *Nelson* court's observation is that the proponent of statistics derived from other methodologies must make known to the trial court, through an offer of proof, the substance and relevance of those statistics and methodologies. "Evidence is properly excluded when the proponent fails to make an adequate offer of proof regarding the relevance or admissibility of the evidence. [Citations.]" (*People v. Morrison* (2004) 34 Cal.4th 698, 724.)

Appellant claims that he was prevented from making an offer of proof. This claim appears to be based on the trial court's refusal to conduct a *Kelly* hearing on the admissibility of the product rule's method of statistical analysis in a cold hit case. But neither this ruling nor any other ruling prevented appellant from making the requisite offer of proof.

Even if the trial court had erred in excluding evidence relating to the statistical significance of the cold hit match, the absence of an offer of proof would preclude us from assessing prejudice. "[T]he reviewing court must know the substance of the excluded evidence in order to assess prejudice. [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 580.) We do not know what statistics would have been generated by methodologies other than the product rule. It may be that the resulting numbers would still have been astronomical and, therefore, of little or no probative value.

For example, the *Nelson* court noted that, pursuant to the database match probability method, " 'the expected frequency of the profile could be calculated through

use of the product rule, and the result could then be multiplied by the number of profiles in the databank. The result would be the expected frequency of the profile in a sample the size of the databank and thus the random chance of finding a match in a sample of that size.' " (*Nelson, supra*, 43 Cal.4th at p. 1262.) Since the database here contained approximately 263,000 DNA profiles, this method of calculation would result in a frequency of the matched DNA profile of 263,000 in 6.7 quadrillion in the African-American population. (2RT 199) This is the equivalent of a frequency of one in 25,475,285,171, more than three times the world population. In view of these astronomical odds, there would still be a "zero possibility" that the spermatozoa recovered from the victims had come from someone other than appellant. Accordingly, if the trial court had erroneously excluded this method of calculation, the error would have been harmless beyond a reasonable doubt.

III

Sentencing Issues Raised by Respondent

Although the court imposed a restitution fine of $200 (§ 1202.4, subd. (b)), it did not impose a parole revocation fine. Section 1202.45 required the imposition of a parole revocation fine in the same amount as the restitution fine. The trial court also did not impose a required court security fee of $60: $20 for each of appellant's three convictions. (§ 1465.8, subd. (a)(1).) The court apparently believed that the statutes imposing the parole revocation fine and court security fee were inapplicable because they became effective after appellant's commission of the rapes.

Respondent contends that the trial court erred. We agree. In *People v. Alford* (2007) 42 Cal.4th 749, 755, 759, our Supreme Court upheld the retroactive application of section 1465.8, which imposes the court security fee. There is no retroactivity problem with section 1202.45, which imposes the parole revocation fine. This section became effective on August 3, 1995, before the commission of the 1996 rapes. (See Stats.1995, ch. 313, §§ 6 & 24.)

IV

Other Sentencing Issues

On January 30, 2009, we mailed a letter to the parties requesting supplemental letter briefs discussing a number of sentencing issues.[5] The first issue was whether the trial court had imposed an unauthorized sentence by designating a minimum parole eligibility term of 15 years as to each of the three rape convictions. Pursuant to section 667.61, subdivision (a)[6] the trial court was required to designate a minimum parole eligibility term of 25 years if the jury found true two or more of the circumstances specified in subdivision (e). Based on the third amended information, the jury verdict forms, and relevant instructions, as to all counts the jury found true two circumstances: (1) appellant "committed the present offense during the commission of a burglary, as defined in subdivision (a) of section 460" (§ 667.61, subd. (e)(2)); and (2) appellant "has been convicted in the present case . . . of committing an offense specified in subdivision (c) against more than one victim." (§ 667.61, subd. (e)(5).) Accordingly, the trial court imposed an unauthorized sentence by failing to designate a minimum parole eligibility term of 25 years as to each of the three rape convictions.[7]

The second issue was whether the trial court had imposed an unauthorized sentence by staying execution of the four-year middle term imposed for each of the two section 12022.3 enhancements. The trial court said that it was staying execution of the four-year terms pursuant to section 654. But in a case such as this involving crimes committed against different victims on separate occasions, section 654 is inapplicable. (*People v. Deloza* (1998) 18 Cal.4th 585, 592.) Therefore, the stay of the enhancements pursuant to section 654 constitutes an unauthorized sentence. (*People v. Scott* (1994) 9

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[5] We granted appellant's request to discuss the sentencing issues in his reply brief.

[6] All references to section 667.61 are to the version of the statute in effect when appellant committed his crimes in 1995 and 1996. (See Stats.1993-1994, 1st Ex.Sess., c. 14, § 1.)

[7] Section 667.61, subdivision (j) allows the 25-year term to be reduced by up to 15 percent for conduct credits. "In no case shall any person who is punished under this section be released on parole prior to serving at least 85 percent of the minimum term of 25 or 15 years in the state prison." (*Ibid*.)

Cal.4th 331, 354, fn. 17 ["the court acts in 'excess of its jurisdiction' and imposes an 'unauthorized' sentence when it erroneously stays or fails to stay execution of a sentence under section 654"].) Section 667.61 did not bar additional punishment for the section 12022.3 enhancements because they were unnecessary to support the "One-Strike" indeterminate terms provided for in that section. (See § 667.61, subd. (f).)

Appellant "concedes errors were made." The unauthorized sentences must be corrected even though respondent did not object when they were imposed and "concede[d]" that the sentences on the section 12022.3 enhancements should be stayed pursuant to section 654. (*People v. Turner* (2002) 96 Cal.App.4th 1409, 1415 ["An unauthorized sentence may be corrected by an appellate court 'regardless of whether an objection or argument was raised in the trial and/or reviewing court' "]; accord, *In re Birdwell* (1996) 50 Cal.App.4th 926, 930-931; see also *In re Andrews* (1976) 18 Cal.3d 208, 212 [invited error doctrine does not apply to unauthorized sentence].) "[A] legally unauthorized sentence can be corrected at any time . . . even though . . . the result is the defendant serves a longer prison term. [Citations.]" (*People v. Miles* (1996) 43 Cal.App.4th 364, 367-368.)

Respondent requests that we "modify the sentences to render them lawful." Appellant requests that the matter be remanded for resentencing so that the trial court may exercise discretion whether "to run concurrent terms for each of the three" rape convictions, whether to strike the enhancements, and whether to impose the low term on the enhancements if the court elects not to strike them.

"[W]e . . . consider a remand here to be an idle and unnecessary, if not pointless, judicial exercise. " (*People v. Coelho* (2001) 89 Cal.App.4th 861, 889.) At the time of sentencing, the trial court denied appellant's request to impose concurrent terms for the rape convictions. The court stated: "In this matter the court is going to exercise its discretion and sentence consecutively based on the defendant's prior record and the multiple incidents with multiple victims in this case."

There is no " 'realistic possibility' " that on remand the trial court would strike the enhancements or impose the low term. (*People v. Smith* (2001) 24 Cal.4th 849, 854.)

Appellant did not ask the trial court to strike the enhancements, but the court had discretion to strike them on its own motion in furtherance of justice. (§ 1385.) The court declined to exercise that discretion when it imposed the four-year middle term on both enhancements. The probation report lists eight aggravating and no mitigating circumstances. It states: "Maximum time in prison is strongly recommended. Protection of the victims and the community warrant no less." Appellant has not set forth any reasons that would justify striking the enhancements or imposing the low term. Thus, we decline to remand the matter for resentencing.

In our letter to the parties, we noted that the abstract of judgment contains several clerical errors: (1) The abstract shows that, as to count 4, appellant was convicted of sexual battery in violation of section 243.4, subdivision (a), instead of forcible rape in violation of section 261, subdivision (a)(2). (2) The abstract does not show that the three life terms for the rape convictions are to be served consecutively. (3) Box 8 on page 1 of the abstract is not checked to show that appellant was sentenced pursuant to section 667.61. (4) The abstract does not show that the trial court imposed a minimum parole eligibility term of 15 years as to each of the three consecutive life sentences for the rape convictions. Instead, it states, "The court orders that the defendant serve a minimum term of 15 years before being eligible for parole." (5) Box 6.a. on page 1 of the abstract is not checked to show that an indeterminate term of 15 years to life was imposed on counts 1, 4, and 5. (See *People v. Mancebo* (2002) 27 Cal.4th 735, 742 ["an indeterminate term of 25 years to life shall be imposed" under section 667.61, subdivision (a), and "an indeterminate term of 15 years to life shall be imposed" under subdivision (b)].)

When the trial court prepares an amended abstract of judgment, these clerical errors must be corrected. Of course, the amended abstract must reflect a term of 25 years to life on each of the three rape convictions instead of the term of 15 years to life erroneously imposed by the trial court.

Disposition

The judgment is modified as follows: (1) As to each of the three consecutive life terms for the rape convictions, appellant shall not be eligible for release on parole for 25

years. (2) As to the two section 12022.3 enhancements, the stay pursuant to section 654 is lifted. (3) A parole revocation fine of $200 (§ 1202.45) and an aggregate court security fee of $60 (§ 1465.8, subd. (a)(1)) are imposed. The parole revocation fine is suspended unless appellant's parole is revoked.

As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment showing the modified judgment and correcting the clerical errors discussed in part IV of this opinion. The trial court is further directed to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Curtis R. Rappe, Judge

Superior Court County of Los Angeles

Nancy J. King , under appointment by the Court of Appeal, for Defendant and Appellant.

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